THE NEW MARKETABLE TITLE ACT

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Amended House Bill No. 81 enacted by the Ohio legislature contains, among other things, legislation of a type which has come to be known as a marketable title act. To the author's knowledge, passage of the bill represents the culmination of more than two years of intensive work by a bar association committee. Since the handling of real property law is peculiarly within the province of lawyers and seldom attracts wide public interest, the efforts are surely made in the finest tradition of public service. Although one may question the advisability of particular provisions, the overall impact of the legislation is a substantial legislative step toward facilitating land title transactions and improving the marketability of land titles.

The substance of the Act, found in Ohio Revised Code sections 5301.47-5301.56, inclusive, follows closely the Model Marketable Title Act promulgated by Professor Lewis M. Simes early in 1960.[1] It may be anticipated, therefore, that the comments which accompanied the Model Act may prove helpful in future years should problems of construction face the Ohio courts. The legislative declaration[2] that the act "shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title" of forty years lends strength to the hope that both simplification of conveyancing procedures and security of titles may be enhanced by the legislation.

The essence of the Marketable Title Act cannot be better stated than was done by Professor Simes: "If a person has a record chain of title for forty years, and no one has filed a notice of claim to the property during the forty-year period, then all conflicting claims based upon any title transaction prior to the forty-year period are extinguished."[3] This abbreviated statement indicates the affirmative operation of the Act in destroying ancient defects which had previously cluttered some land titles, and emphasizes the Act's unique characteristics. The Act is not a statute of limitations, since loss of the ancient claim is not dependent upon failure to sue. Rather, the claim is lost

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1 Simes and Taylor, Improvement of Conveyancing by Legislation 6 (1960). This treatise, prepared for the Section of Real Property, Probate and Trust Law of the American Bar Association and the University of Michigan Law School contains a wide variety of Model Acts dealing with specific title problems, suggested major remedies, and discussions of legal problems inherent in any proposed revision of conveyancing law.

2 Ohio Rev. Code § 5301.55.

3 Simes and Taylor, Improvement of Conveyancing 4 (1960).

by failure to file a preserving notice within forty years.[4] It is not a curative act in the common sense of that term, since it is aimed not at a particular defect which commonly recurs, but at a wide range of defects, all of which are eliminated by passage of time and failure to preserve the claim by filing a proper timely notice. No lawyer who has examined land titles can fail to appreciate the value of the Act since it permits him to concentrate his attention, with limited exceptions, on the effectiveness of recent title transactions and to dismiss from consideration numerous ancient defects in the chain of title which are often more apparent than real.

The above abbreviated statement of the thrust of the Marketable Title Act is also an over-simplification of its operation and may tend to mislead the unwary attorney. For this reason, after a brief discussion of the important concepts involved in the Act, I shall endeavor to show some of the dangers in the act by raising specific questions which may be asked by attorneys who are called upon to handle real estate transactions.

THE CONCEPTS OF THE ACT

There are two concepts which dominate the Marketable Title Act—the concept of "marketable record title" and the concept of a "root of title." Both are defined specifically in the Act,[5] but a clear understanding of them is imperative. "Root of title" refers to a conveyance or other title transaction which purports to create the interest being claimed. Thus a quit claim deed may be the root of title if it purports to convey a specific interest in an identifiable tract of land. A probate decree, a quiet title decree, a sheriff's deed or a mortgage may all serve as a "root of title," provided only that it has been of record more than 40 years from the time marketability of the interest is called into question. Thus, the attorney examining an abstract of title (or examining records in the recorder's office) can readily locate a starting point for examining the validity of the interest in land with which he is concerned. He starts his chain of title with the transaction which first appears on record more than forty years from the time he is working.

One of the excellent features of the Ohio Act is that it is automatically progressive in its operation. Unlike the Iowa Act[6] which requires periodic re-enactment, the Ohio Act will continuously move forward, eliminating claims based on transactions which pre-date the

[4] In Ohio Revised Code section 5301.49(b) a cross reference is made to section 5301.50. The correct reference should be to section 5301.51.

[5] Ohio Rev. Code § 5301.47.

[6] Iowa Code Ann. § 14.17.

newly developing roots of title. Every deed recorded prior to 1921 is today a potential "root of title." In ten years every deed recorded prior to 1931 will so operate and a decade of potential defects will be eliminated.

The concept of a "marketable record title" is defined in Ohio Revised Code section 5301.47 as "a title of record, as indicated in Section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in Section 5301.50 of the Revised Code." Section 5301.48 then spells out the requirements for establishing for the claimant an unbroken chain of title of record. It may be that the claimant will have an unbroken chain of title which will consist of only one transaction—namely, the "root of title" transaction which has been recorded more than 40 years. It may be that the chain will consist of several links. For example, a deed recorded in 1919, purporting to transfer Blackacre to A, may be the root of title. Subsequent deeds from A to B, recorded in 1930, from B to C, recorded in 1946, may complete the chain of title for C's claim. In either case, there must be "nothing appearing of record . . . purporting to divest such claimant of his purported interest." The phrase "purporting to divest" is not defined in the statute. It is used also in the Michigan Marketable Title Act,[7] and the Title Standards adopted by the Michigan State Bar Association deal with the phrase as follows:[8]

"Standard 1.4—Matters 'Purporting to Divest' within the meaning of the forty year Marketable Title Act are those matters appearing of record which, if taken at face value, warrant the inference that the interest has, in truth, been divested."

The Michigan Title Standards give several examples, two of which are set out here to illustrate the meaning of the term:

Problem A: Frank Thomas is the last grantee in the regular chain of title to Blackacre by a deed recorded in 1910. In 1949 a warranty deed executed by a stranger to the title conveying Blackacre to Ralph Allan was recorded. Is this an instrument "purporting to divest" Thomas of his interest within the meaning of the Forty Year Marketable Title Act?

Answer: No. While the giving of a warranty deed by a stranger to the title appears to be incompatible with retention of title by Thomas, the instrument does not in itself set forth any matters indicating that Thomas' interest has been conveyed. But see comment below.

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[7] Mich. Comp. Laws §§ 565.101-565.109 (1948); Mich. Stat. Ann. §§ 26.1271 to 26.1279.

[8] 35 Mich. St. Bar. Jour. 16 (Aug. 1956).

Problem D: Frank Thomas is the last grantee of record in the regular chain of title to Blackacre by a deed recorded in 1910. A deed of Blackacre from Burt Tillson to Harry Cook, dated and recorded in 1938, recites that Frank Thomas has died intestate and that the grantor therein is his sole heir at law. Is this an instrument "purporting to divest" Thomas of his interest within the meaning of the Forty Year Marketable Title Act?

Answer: Yes. If the recitals in the Tillson deed were true in fact, Cook has acquired the interest once vested in Thomas. Even if the recitals were not factually correct, the deed in question is one "purporting to divest" as the term is used in Section 2 of the Act.

It should be noted that although the instrument in Problem A, above, is not one "purporting to divest" a person of his interest within the meaning of the Marketable Title Act, it does not follow that the title examiner can disregard it. Thus, while the 1949 deed placed of record does not prevent Frank Thomas from having marketable record title and securing the advantages of the Act so far as cutting off stale claims is concerned, prudence would nevertheless require an investigation to determine why the deed from an apparent stranger to the title appears on the record. Moreover, Revised Code section 5301.49(D) specifically makes the marketable title subject to "any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title or (of)[9] record is started."

With these conceptual matters disposed of, we may turn to certain specific questions of interests to title examiners.

May a title examiner safely ignore all transactions which pre-date his root of title?

Despite the fact that an affirmative answer would represent the ideal solution to simplification of title searches, the answer to this question is certainly "no." The Act itself renders the marketable record title subject to certain matters.[10] These include easements held for railroad or public utility purposes and all mineral interests. These two exceptions were not included in the Model Act but were added by the Ohio legislature, presumably in response to complaints from utility and mining interests that the Act would work extreme hardships. It is probably true that some railroad and utility companies hold a tremendous number of easements, and it would be something

[9] The word "or" appears in the enrolled bill, yet the word "of" seems to have been intended.

[10] Ohio Rev. Code §§ 5301.49, 5301.53.

of a burden to file individual preserving notices for each tract of land involved. Similarly, large mining interests may hold mineral rights not currently being exploited on many separate tracts of land. The legislative decision to grant an unqualified exception for such interests may thus be justified on practical grounds. Yet these exceptions tend to weaken the beneficial effects which might otherwise be achieved in freeing lands from interests created at remote times. In any event, the existence of these two exceptions would seem to make it imperative that the title examiner look through the earlier transactions to ascertain whether interests of the kind described were created prior to the date of the root of title because those are the interests which will persist. It should also be noted that two other exceptions, not included in the Model Act, were added by the Ohio legislature. One relates to mortgages properly recorded under Revised Code section 1701.66. The other excepts easements or interests in the nature of easements where the existence of such interests is evidenced by the "location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable." The latter exception probably overlaps in many instances the exception for utility easements, but it is broader in its coverage and would include some non-utility easements. Whether the exception be wise or not, it emphasizes again the need for the examiner to search the record prior to the root of title if the purchaser's anticipated use of the land would be adversely affected by by the existence of these interests.

One should not conclude that these exceptions nullify the benefits of the Act. A competent title examiner can ascertain rather quickly whether any excepted interests appear in the earlier instruments, and his task is materially lightened since the scope of his search is relatively narrow.

How are defects handled when they occur within the forty year period?

The Act does not purport to cure all titles. Any instrument on record during the forty year period must be considered, since it may create a title problem. The record title is made subject to any defect "inherent in the muniments of which" the record chain of title is formed, and such defects must be cured in the usual fashion. Thus, title examiners in Ohio must still wrestle with the fee tail estate, with incorrect descriptions, with improperly executed deeds, or even with ancient interests if those matters appear in the forty-year chain. Thus, for example, if a deed in 1950 transfers Blackacre to B, "subject to a right of flowage in X created by a certain deed recorded in 1886 in

Liber 3, Page 161 of the records of Y County," a purchaser today from B would take subject to the flowage right. The Act is designed to assure a reasonable title search, not to serve as a cure-all for title matters.

There is one matter here which should be noted. It is a rather common conveyancing practice for draftsmen to include in the deed description some such language as "subject to easements and use restrictions of record." This is a device which is probably adequate to protect the grantor from liability on his covenants for title in a warranty deed should there be burdens of that type on record. This throws the risk of title search on the purchaser. The Ohio Act has wisely adopted the provision in the Model Act which makes such a general reference inadequate to preserve the ancient interests even though the general reference appears in the muniments of title which make up the forty year chain. To preserve such interests, a specific identification of the earlier title transaction is required.[11]

How can a person preserve an interest created more than 40 years ago?

The destruction of ancient interests would hardly be tolerated if no method of preserving them were provided.[12] Revised Code section 5301.49 provides that marketable record titles are subject to interests preserved by timely filing of a notice that such interest exists. As to any existing interest arising from an ancient transaction, an initial period of three years is allowed by Revised Code section 5301.56. Revised Code sections 5301.51 and 5301.52 spell out the effect of filing a notice, the content which must be included, and the mode of indexing. Incidentally, House Bill 81 contains amendments to Revised Code sections 317.08, 317.18, and 317.20, and the Bill adds a new section, Revised Code section 317.201, to provide in the record-keeping statutes for the new type of instrument which may now be recorded. The notices will be indexed in the reverse index for deeds,[13] and a separate "Notice Index" will be maintained by tract.[14]

One factor should be noted as to the length of time a person has to file his preserving notice. It can never be less than 40 years from the time the interest is created, but it may be considerably longer. Revised Code section 5301.51(A) permits the filing "during the forty year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable."

[11] Ohio Rev. Code § 5301.49(A).

[12] As to the constitutionality of marketable title acts generally, see Simes and Taylor, Improvement of Conveyancing by Legislation 253-73 (1960).

[13] Ohio Rev. Code § 317.08(A).

[14] Ohio Rev. Code § 317.201.

Thus, suppose A acquired a remainder interest in Blackacre in 1910. In 1916, the holder of the life estate gives a deed to B which purports to create a fee simple in B. This deed is recorded in 1916. It could serve as a root of title for a marketable record title which conceivably could extinguish A's interest. But if A recorded a preserving notice in 1955, his interest would be preserved. Though more than 40 years from the creation of the interest, it is within 40 years from the effective date of the root of title.

What is the relation between this Marketable Title Act and the doctrines of adverse possession?

The new act does not affect the operation of statutes of limitation nor the doctrine of adverse possession.[15] Thus, even as one before the statute might have a perfect chain of title on paper which was lost to an adverse possessor who occupied the land for the period of limitations, so now, the marketable record title described in the Act may be subordinated to a title acquired by adverse possession, if that adverse possession occurred wholly or partially within the time subsequent to the effective date of the root of title. To the lawyer representing a land purchaser, this means that an examination of the premises to determine the possessory condition is as necessary now as it was before.

It seems equally clear that the Act could bar a title acquired by adverse possession in the distant past. Thus, if A owned Blackacre in 1890 and B entered into adverse possession at that time, his continued possession for 21 years would yield a title in B. Let's suppose further, however, that in 1915, A gave a deed to X purporting to create a fee simple in X. That deed is promptly recorded. X conveys to Y in 1936. Nothing else appearing in 1961, Y would have a marketable record title under the new legislation, with the 1915 deed as the root of title. The title by adverse possession, acquired in 1911 would be extinguished unless proper notice were filed.

What treatment is given to rights of entry and possibilities of reverter?

Rights of entry and possibilities of reverter, like other interests in land, may potentially be destroyed by the general operation of the Act. Thus, if land were conveyed to the Homestead School District in 1880 "so long as it is used for school purposes," the grantor would retain a possibility of reverter. If, in 1900, the land were conveyed to Lincoln School District, with no reference to the special limitation,

[15] Ohio Rev. Code § 5301.49(C) makes the marketable record title subject to the rights of any person arising from adverse possession if such adverse possession is in whole or in part subsequent to the effective date of the root of title. Ohio Rev. Code § 5301.54 specifically preserves the period of the statute of limitations.

that deed, if recorded, might now serve as a root of title for a title in fee simple absolute. Unless preserved by the timely filing of a preserving notice, the possibility of reverter could be extinguished.

The new legislation contains an added provision, not found in the Model Act, which is even more destructive of these interests than of other interests. Revised Code section 5301.49(A) provides generally that the record marketable title shall be held subject to all interests and defects which are inherent in the muniments of which such chain of record title is formed. Thus, in the example above, if the 1900 deed to Lincoln School District made adequate reference to the special limitation in the 1880 deed, then in the absence of other provisions the possibility of reverter would be preserved as long as the 1900 deed was the root of title. The Act, however, contains a specific proviso that "possibilities of reverter and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in Section 5301.51 of the Revised Code." Thus, even if the interests are found in the forty year search, if they were created more than forty years before the time of examination, they are extinguished unless a preserving notice has been filed. This is probably a wholesome addition to the Model Act, since a time limitation on the effectiveness of such interests is generally desirable. Indeed, several states have enacted legislation specifically limiting the duration of such interests.[16]

What interests are extinguished by the operation of the Marketable Title Act?

Revised Code section 5301.50 provides that, except for the specific interests preserved by the Act, a record marketable title is "free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title." It goes on to indicate that both legal and equitable interests, present or future interests, whether owned by a resident or non-resident, whether owned by a person *sui juris* or under a disability, and whether owned by a natural or corporate person are all subject to extinguishment if proper preserving notice is not recorded. One could hardly ask for more inclusive language and the purpose of the Act is best served by these broad terms.

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[16] See Simes and Taylor, Improvement of Conveyancing by Legislation, 201-17 (1960).

Conclusion

Despite the fact that broad exceptions have been given to mining interests, utility easements, railroad easements, and pipeline easements, the effect of the Marketable Title Act cannot be other than beneficial to the State of Ohio. Lawyers who supervise real estate transactions and title insurance companies will be aided considerably in their work. More important, the members of the public who sell land should find greater ease in furnishing requisite proof of good title, and purchasers may be more secure in their title. The Act, though technical in some respects, is well-drafted and should present a minimum of construction problems for the future. Lawyers must, of necessity, familiarize themselves with the exceptions contained in the Act, but the job of title examination should prove easier, and the haunting doubts which all have experienced when deciding that an ancient record defect should be passed over can now be eliminated.